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Supreme Court, U.S.
FILED

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No.

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1998

LARRY D. KIEL,

Petitioner,

V.

H. N. SCOTT,

Respondent.

On Petition For Writ of Certiorari To The United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

LARRY D. KIEL
JOSEPH HARP CORRECTIONAL
CENTER, DOC #208518
P.O. BOX 548
LEXINGTON, OK 73051

Petitioner is incarcerated in Joseph Harp Correctional Center, Lexington, Oklahoma. He has exhausted all his remedies in State and Federal Courts and still has not been able to receive a hearing on the merits of his appeal. He has been thwarted at every doorway and been denied entrance into the United States system of justice due to strict and unyielding adherence to procedural, not substantive, rules. Petitioner respectfully requests consideration from this Court.

QUESTIONS PRESENTED

1. Whether this Court should grant review to resolve a split of authority within varying jurisdictions to allow using an expanded version of the "mailbox rule" which allows consideration of appeals that have been timely placed by inmates in the prison mail system.

2. Whether refusal by the Oklahoma Court of Criminal Appeals to allow consideration of appeals which have been timely placed by inmates in the prison mail system violates the United States Constitution's Fourteenth Amendment Equal Protection Clause.

3. Whether refusal by the Oklahoma Court of Criminal Appeals to consider appeals which have been timely placed by inmates in the prison mail system creates discriminatory practices which violate Article 2 § 6 the Oklahoma Constitution.

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There is a split in authority as to the application of the "mailbox rule" to the inmates of a prison system. The failure or refusal of any Court to deny those incarcerated in the prison system the use of an expanded version of the "mailbox rule" raises important issues regarding uniform application of said rule, discrimination of those incarcerated, and denial of their constitutional right to equal protection under the law.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit appears at App. 1-A and is unpublished.

JURISDICTION

The judgment below was entered on February 18, 1999, App. 1-A, and rehearing was denied on March 10, 1999; App. 29-A. This Court has jurisdiction to issue the writ of certiorari under 29 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AT ISSUE

U.S.C.A. AMEND. 14

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny any person within its jurisdiction to equal protection under the law.

OK. CONST., ART. 2, § 6

The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right

and justice shall be administered without sale, denial, delay, or prejudice.

STATUTORY PROVISION AT ISSUE

22 Okl.St.Ann., § 1087 provides in relevant part that:

A final judgment entered under this act may be appealed to the Court of Criminal appeals on petition in error filed either by the applicant or the state within thirty (30) days from the entry of the judgment. Upon motion of either party on filing of notice of intent to appeal within ten (10) days of entering the judgment, the district court may stay the execution of the judgment pending disposition on appeal; provided, the Court of Criminal Appeals may direct the vacation of the order staying the execution prior to final disposition of the appeal.

RULE PROVISION AT ISSUE

T. 22, Ch 18, App., Okl.St.Ann., Rule 1.5

The filing date for matters before the Court of Criminal Appeals is the date when the Clerk's office is open for the performance of public business and the item is actually received by the Clerk before the close of business in proper order and with the necessary number of copies and all necessary filing fees, or a pauper's affidavit for waiver of filing fees.

STATEMENT OF FACTS

On November 19, 1990, a six count information, Case No. CF-90-6063, was filed by the Oklahoma County District Attorney in the District Court of Oklahoma County against the Petitioner Larry D. Kiel and a co-defendant. Both Petitioner and co-defendant were charged with trafficking in cocaine and other felony drug related counts. Petitioner was arraigned, a preliminary hearing was held, and Petitioner was bound over for trial on all charges. Subsequently, Petitioner filed a Motion to Suppress the evidence presented at the Preliminary Hearing. The Motion was heard by Associate District Judge Melinda Monnet. Judge Monnet initially denied the Motion to Suppress, but upon a Motion to Reconsider filed by Petitioner, she reversed her prior ruling and sustained the Motion to Suppress in Case No. CF-90-6063 and the case was then assigned to Judge Richard Freeman.

The District Attorney filed a Motion to Dismiss Case No. CF-90-6063, and Judge Freeman granted the State's Motion on May 24, 1991. On that same day, the District Attorney again filed the identical charges against Petitioner and his co-defendant in Case No. CF-91-2683. Petitioner was arraigned, bond was set and a preliminary hearing was scheduled in Case No. CF-91-2683 for September 11, 1991. However, on that date, Special Judge Wendell Smith declined to give Petitioner a preliminary hearing in Case No. CF-91-2683, stating that he had already had a preliminary hearing on the same charges in Case No. CF-90-6063 and bound him over for trial after which the case was assigned to Judge James Gullett for jury trial. Petitioner then filed a Demurrer to the information in Case No.

CF-91-2683. On October 11, 1991, Judge James Gullett overruled Petitioner's Demurrer and a jury trial was scheduled.

A jury was impaneled and sworn on January 6, 1992, and Petitioner objected to all evidence previously suppressed in Case No. CF-90-6063. Upon advice of counsel, Petitioner stood mute during three (3) days of trial as the District Attorney presented all previously suppressed evidence over the objection of Petitioner. Petitioner was convicted on all counts, and Judge James Gullet sentenced him to two thousand five hundred and one (2,501) years.

Petitioner timely appealed and submitted his brief on September 8, 1992. The case was assigned to the Emergency Appellate Panel No. 16D. On June 9, 1995, the Panel rendered its opinion affirming the decision of the trial court. The Petitioner filed a Petition for Rehearing which was denied on March 26, 1996. On April 15, 1995, Petitioner by and through his counsel of record filed a Petition for Review of the Emergency Appellate Division Panel 16D's decision.

On April 16, 1997, Petitioner filed an Application for Post-Conviction Relief pro se in the District Court of Oklahoma County which was denied on May 21, 1997. On May 27, 1997, Petitioner timely filed his Notice of Intent to Appeal and Stay of Execution of Judgment Pending Appeal. On June 23, 1997, Petitioner filed a Petition in Error with the Oklahoma Court of Criminal Appeals which was dismissed by said Court on September 8, 1997, declining jurisdiction. Petitioner next filed a Petition for a Writ of Habeas Corpus in the United States District Court for the Western District of Oklahoma pursuant to

28 U.S.C. § 2254 by a person in state custody. This was also dismissed for lack of jurisdiction.

On May 14, 1998, Petitioner still representing himself pro se, appealed to the United States Court of Appeals for the Tenth Circuit. Dismissal of that Appeal and Petitioner's subsequent request for rehearing allows Petitioner only one avenue of recourse left; therefore, Petitioner has filed this Application for a Writ of Certiorari with the United States Supreme Court.

ARGUMENT

THERE IS A SPLIT IN AUTHORITY AS TO THE APPLICATION OF THE "MAILBOX RULE" TO THE INMATES OF A PRISON SYSTEM. THE FAILURE OR REFUSAL OF ANY COURT TO DENY THOSE INCARCERATED IN THE PRISON SYSTEM THE USE OF AN EXPANDED VERSION OF THE "MAILBOX RULE" RAISES IMPORTANT ISSUES REGARDING UNIFORM APPLICATION OF SAID RULE, DISCRIMINATION OF THOSE INCARCERATED, AND DENIAL OF THEIR CONSTITUTIONAL RIGHT TO EQUAL PROTECTION UNDER THE LAW.

When the Supreme Court decided *Houston v. Lack*, 487 U.S. 266, 108 S.Ct. 2379 (1988), and subsequently amended their court rules to include within the framework of the "mail box rule," a pro se Petitioner who is incarcerated within a penal system being deemed to have fulfilled the requirements of appellate rules by determining that notices of appeal are 'filed' at the moment of delivery to prison authorities for forwarding

to the district court" *Houston v. Lack*, 487 U.S. at 266 cf. *Fallen v. United States*, 378 U.S. 139, 84 S.Ct. 1689, 12 L.Ed2d 769, it gave credence and legitimacy to an oft used safeguard for incarcerated pro se appellants. The decision in *Houston* sets forth the dilemma regarding the unique position of prisoners seeking to appeal without counsel.

Such prisoners cannot take the steps other litigants can take to monitor the processing of their notices of appeal and to ensure that the court clerk receives and stamps their notices of appeal before the 30-day deadline. Unlike other litigants, pro se prisoners cannot personally travel to the courthouse to see that the notice is stamped 'filed' or to establish the date on which the court received the notice. Other litigants may choose to entrust their appeals to the vagaries of the mail and the clerk's process for stamping incoming papers, but only the pro se prisoner is *forced to do so* by his situation. *Emphasis added. Houston* at 270-271.

The *Houston* decision gave direction and guidance to the many appellate courts who have wrestled with this issue – the rule of law to the letter balanced against the discrimination against those most in need of the judicial system, pro se prisoners. *See*, e.g., *Morrison v. Thoelke*, 155 So. 889 (Fla. App.1963*); Sanchez v. Board of Regents of Texas Southern University*, 625 F.2d 521, 522 (CA5 1980); *Dowd v. United States ex rel. Cook*, 340 U.S. 206, 71 S.Ct. 262 (1951) (A discriminatory denial of statutory right of appeal to one convicted of an offense in state court was a violation of equal protection clause of the Fourteenth Amendment. U.S.C.A. Const. Amend. 14).

Haag v. State of Florida, 591 So.2d 614 (1992), applied the rationale of *Houston v. Lack* to Florida constitutional and statutory law of Florida determining that under the Florida constitution all persons have a right to equal protection of the laws, which includes a right of equal access to the courts and "nothing in our law suggests that the two-year limitation must be applied harshly or contrary to fundamental principles of fairness."

Oklahoma's constitution is similar to Florida's in that Article 2 § 6 of the Oklahoma Constitution also guarantees its citizens that "The courts of justice of the State shall be open to every person, and . . . justice shall be administered without sale, denial, delay, or prejudice."

Oklahoma's Court of Criminal Appeals has historically taken a hard line in relation to appeals not filed within the framework of the Court's promulgated rules, specifically T.21, Ch. 15, App., Rule 1.5. In 1980, a decision in *Smith v. State of Oklahoma*, 611 P.2d 276 (1980), set the current standard of application of this rule used by the Oklahoma Court of Criminal Appeals. In *Smith*, Appellant filed an application seeking leave to file an appeal out of time having presented related post-conviction application to district court, which dismissed and entered an order reciting that district court was without authority to grant any relief on the application. The Court of Criminal Appeals held that: "(1) proper procedure to secure appeal out of time remedy is filing of post-conviction application in district court where findings of fact and conclusions of law should be made as to whether applicant was denied a direct appeal through *no fault of his own*." *Emphasis added.*

This no-fault rule has consistently been held as the remedy for any procedural deficiency in an appeal by having the District Court make additional findings of fact or conclusions of law through evidentiary hearings, depositions, affidavits, and/or briefs as to the "fault" of the appellant.

In appeals such as the case at bar coming before the Oklahoma Court of Criminal Appeals, they counter with their own set of procedures which is inconsistent with any of the appellate procedural remedies afforded to Oklahoma citizens through the Supreme Court of Oklahoma *(See, Woody v. State of Oklahoma, ex rel. Dep't of Corrections*, 833 P.2d 257 (1992), 22 Okl.St.Ann § 1087, and 12 Okl.St.Ann. § 990A) and federal appellate courts; thereby, being not only discriminating against the "unskilled in law, unaided by counsel, and unable to leave the prison," as quoted in *Houston v. Lack*, 487 U.S. 266 at 266, but for all practical purposes removing them from access to the court system in criminal appeals in the State of Oklahoma.

The prison system in Oklahoma is not well-known for its up-to-date law libraries and in fact, your Petitioner has been incarcerated in Joseph Harp Correctional Center and attached as Appendix 1c is an affidavit from the inmate law clerk stating the current availability of Oklahoma law to those incarcerated at that facility. This is the material that the Oklahoma Court of Criminal Appeals expects an inmate to use to perfect an appeal within a 30-day time limit. All that is allowed to pro se inmates is out-dated law that the inmate has no way to of timely learning what new law exists or how to begin to follow it.

The Oklahoma Court of Criminal Appeals has been adamant about their refusal to even consider the inroads to solving some of the difficulties of inmates by allowing the application of the expanded "mail box rule" as defined in *Houston*. *Houston v. Lack*, 487 U.S. 266 at 272 (The question is one of timing, not destination: whether the moment of "filing" occurs when the notice is delivered to the prison authorities or at some later juncture in its processing....the notice of appeal was filed at the time petitioner delivered it to the prison authorities for forwarding to the court clerk).

In three recent decisions handed down by the Oklahoma Court of Criminal Appeals, the results were predictable and consistent. *See Hunnicutt v. State of Oklahoma*, 952 P.2d 988 (1997); *Behrens v. James Patterson, Clerk and Glenda Burris, Dep. Clerk, of App. Ct.*, 952 P.2d 990 (1997); and *Banks v. State of Oklahoma*, 953 P.2d 344 (1998).

In *Hunnicutt* the Defendant petitioned for rehearing requesting that court allow appeal to proceed, after attempted post-conviction appeal was denied by the Court of Criminal Appeals as untimely. The Oklahoma Court of Criminal Appeals stated that "failure to file appeal in appellate court within time allowed by law is fatal to appeal, and appellate court has no discretion to hear and determine appeals on merits when they are not taken within time prescribed by law." *Hunnicutt* at 989. The Defendant cited *Houston v. Lack* and *Woody v. State ex rel. Dep't of Corrections*, and the Court held that

> Petitioner's reliance upon *Houston* is misplaced. *Houston* raised the question: "Whether under

> Federal Rule of Appellate Procedure 4(a)(1). . . notices [of appeal by pro se prisoners] are to be considered filed at the moment of delivery to prison authorities to forwarding" to the appellate court clerk? Although the Supreme Court answered this question in the affirmative, its interpretations of the Federal Rules of Appellate Procedure are not controlling as to the construction of any Oklahoma rule of appellate procedure. *Hunnicutt* at 989.

The Court further held that "The decision of the Oklahoma Supreme Court in *Woody* rests upon a special statute applicable only to appeals in that court." *See* 22 Okl.St.Ann. § 1087. This statute, creating what is known as a "mail box rule," and expanded by the *Woody* court for the benefit of pro se prisoners was therefore inapplicable to criminal matters filed with the Court of Criminal Appeals.

In *Behrens* a pro se prisoner petitioned for a Writ of Mandamus to require court clerks to docket his appellate pleadings as of the date the pleadings were given to prison authorities. Defendant also relied on the *Houston* decision which the Court again claims is misplaced. "Currently state law and this Court's Rules establish the filing date for matters before the Court of Criminal Appeals..." *Behrens* at 991.

Finally in *Banks v. State of Oklahoma*, 953 P.2d 344, a state prisoner filed an appeal from an Orderof the District Court of Tulsa County, denying an application for post-conviction relief and appeal was denied by the Court of Criminal Appeals as untimely. The United States District Court for the Northern

District of Oklahoma granted a conditional Writ of Habeas Corpus that would issue unless state prisoner was granted an out-of-time appeal. The Court of Criminal Appeals, responded with a lengthy dissertation about federalism, concluding that this set of circumstances were the result of a failure of federalism. *Banks* at 344.

> Federal courts may not second-guess a state legislature or state judicial system. Indeed, with the sole exception of the United States Supreme Court, no federal court has any appellate or supervisory authority over this Court or any other state court. If a state law, or a state court rule, does not violate the federal constitution or infringe on a federally created right, the federal courts are bound by the state rule. The rule may differ from federal rules; it may not make sense; it may even be bad. However absent a federal constitutional right or claim, a federal court may not review the law *de novo* and simply disagree with it. *Banks* at 344.

The failure of the Oklahoma Court of Criminal Appeals to allow the legitimate use of the expanded "mail box rule" to allow consideration of Appeals that have been turned over to prison authorities by inmates for mailing within the statutorily prescribed time limit but not received by the court clerk until after that time period had run is discriminatory to the entire population of inmates who must, through lack of resources, represent themselves pro se.

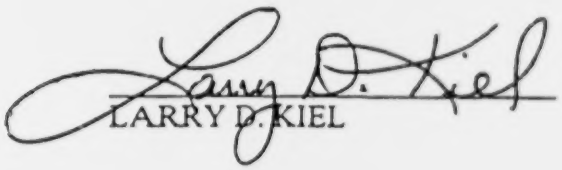
A discriminatory denial of a right to appeal is a violation of an individual's equal protection rights and a denial of equal

access to the courts, being violations of the Constitution of the United States' Fourteenth Amendment equal protection clause and the Oklahoma Constitution Article 2 § 6.

CONCLUSION

A fundamental right denied to anyone of us is a right denied to us all. As most effectively stated by Justice Black in *Dowd v. United States ex rel. Cook,* 340 U.S. 206, 71 S.Ct. 262 (1950): "Both the trial court and prison officials should be cooperative on the matter of perfecting appeals so as to avoid the charge of denial of equal protection of the law" and "(N)either should ever become active participants in the denial of the right to appeal, and thus as implements in denial of due process." Neither should the appellate court. The petition for a Writ of Certiorari should be granted.

Respectfully submitted,



LARRY D. KIEL

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

[stamp-FILED; FEB 18, 1999; PATRICK FISHER, CLERK OF THE TENTH CIRCUIT COURT OF APPEALS]

LARRY D. KIEL,	)	
	)	
Petitioner - Appellant,	)	
	)	
	)	No. 98-6209
v.	)	(D.C. No. CIV-97-1737)
	)	(W.D. Okla.)
H.N. SCOTT,	)	
	)	
Respondent - Appellee.	)	

ORDER AND JUDGMENT*

Before **PORFILIO, BARRETT,** and **KELLY,** Circuit Judges.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 35.3.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P.34 (a) (2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Petitioner-Appellant, Larry D. Kiel, appeals from the District Court's Order dismissing his 28 U.S.C. § 2254 Petition for a Writ of Habeas Corpus. This matter comes before us on Petitioner's application for a certificate of appealability (COA). See id. § 2253(c). We deny COA and dismiss the appeal.

Appellant was convicted in 1992 of various drug offenses and given sentences of 1000 years' imprisonment for trafficking in illegal drugs, 1000 years for possession of a controlled dangerous substance with intent to distribute, 250 years for possession of a controlled dangerous substance without a tax stamp, 250 years for maintaining a vehicle where a controlled dangerous substance is kept, and one year and

$1,000 fine for possession of drug paraphernalia, all after former conviction of two or more felonies. After unsuccessfully pursuing his remedies in the Oklahoma courts, he filed this Habeas Petition. The District Court dismissed Appellant's Petition as untimely. It noted that he filed his Petition after the enactment of AEDPA, and so a one-year period of limitation applies. See 28 U.S.C. § 2244(d). This limitation period began running on the date on which the Appellant's judgment of conviction became final by conclusion of direct review or the expiration of the time to seek such review. See id. § 2244 (d) (1) (A).

Appellant's judgments of conviction became final for purposes of § 2244(d) on July 30, 1996, and the one-year period began running on that date.[1] The one-year time limit is tolled,

[1] An emergency panel of the Oklahoma Court of Criminal Appeals affirmed appellant's convictions on direct appeal on June 9, 1995. That court subsequently denied his Petition for review of the panel opinion on May 1, 1996. Appellant did not seek certiorari review by the Supreme Court within the ninety days permitted by

however, during any time a properly filed application for state post-conviction relief pending. See § 2244(d)(2). On April 16, 1997, within the one-year limitation period, appellant filed an application for post-conviction relief with the Oklahoma County District Court. This suspended the running of the limitations period, with 105 days remaining.

The state district court subsequently denied appellant's application for post-conviction relief on May 21, 1997. The remaining 105 days of the one-year period ran out on September 3, 1997. Appellant did not file his habeas petition until October 29, 1997, some fifty-six days beyond the expiration of the statute of limitations. He now contends, however, that he was entitled to a further tolling of the limitations satute, which would make his petition timely.

Supreme Rule 13(1), making his conviction final at the end of the ninety-day period. The District Court erroneously calculated the ninety-day period as ending on July 31, 1996, rather than July 30.

1. Statutory tolling

Appellant argues that he was entitled to an additional statutory tolling period for the time that his appeal from the denial of post-conviction relief was pending in the Oklahoma Court of Criminal Appeals. He filed his appeal in the Oklahoma Court of Criminal Appeals on June 23, 1997. That court denied jurisdiction of the appeal by order entered September 8, 1997, concluding that the appeal had not been timely filed. Because the appeal was untimely, the Federal District Court concluded that it was not "properly filed" within the meaning of § 2244(d)(2) and therefore did not further toll the statute of limitations. See Lovasz v. Vaughn, 134 F.3d 146. 148 (3d Cir. 1998) ("Properly filed" application, for purposes of § 2244(d), is one that has been "submitted according to the state's procedural requirements, such as the rules governing the time and place of filing."). We agree.

Appellant asserts, however, that his appeal was timely

because he handed the paperwork necessary to perfect his appeal to his jailers within the deadline set by Oklahoma law. The District Court properly rejected this argument, noting that the "prison mailbox rule" developed in Houston v. Lack, 487 U.S. 266 (1988) does not apply to criminal matters filed in the Oklahoma Court of Criminal Appeals. See, e.g., Banks v. State, 953 P.2d 344, 345-47 (Okla. Ct. Crim. App. 1998) We agree with the district court that appellant was not entitled to a further statutory tolling period based on his untimely appeal.

2. Equitable tolling

Appellant argues, alternatively, that even if he did not meet the statutory criteria for tolling, the district court should have equitably tolled the running of the time period for filing a Habeas Petition during the time his appeal was pending. See Miller v. Marr, 141 F.3d. 976, 978 (10th Cir.) (holding that limitation period imposed by § 2244 is not jurisdictional but rather is subject to equitable tolling), cert. denied, 119 S. Ct. 210

(1998). The district court rejected the application of equitable tolling, stating that appellant had not shown any extraordinary reason why he could not have prepared and filed his Petition by the deadline.

In determining whether equitable tolling is appropriate, we recognize that "{d}ismissal of a first Federal Habeas Petition is a particularly serious matter, for that dismissal denies the Petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty". Lonchar v. Thomas, 517 U.S. 314, 324 (1996). At the same time, equitable tolling also should not be used to thwart the intent of Congress in establishing a statute of limitations for habeas claims. See Calderon v. United States Dist. Ct., 128 F.3d 1283, 1288 (9th Cir. 1997) (stating that equitable tolling should be granted only if "extraordinary circumstances" beyond a prisoner's control make it impossible to file his Petition on time), cert. denied, 118 S. Ct. 899, 1389 (1998).

Equitable tolling has historically been limited to situations where the Petitioner "has actively pursued his judicial remedies by filing a defective proceeding during the statutory period, or where the (Petitioner) has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass". Irwin v. Department of Veteran Affairs, 498 U.S. 89, 96 (1990) (footnotes omitted). Thus, equitable tolling may be appropriate where a petitioner has been deceived by an incorrect representation by an adversary, court or agency. See Johnson v. United States Postal Serv., 861 F2d 1475, 1481 (10th Cir. 1988). That has not occurred in this case and Appellant's pleading was filed outside the deadline. Although a petitioner's diligence in pursuing a claim is a prerequisite for equitable tolling, it is not sufficient in and of itself.

We recognize that the Oklahoma Court of Criminal Appeals would not publish its rejection of the mailbox rule until after appellant had handed his paperwork to the prison

authorities. See Hunnicutt v. State, 952 P.2d 988 (Okla. Ct. Crim. App. 1997). Given the statutory jurisdiction and independence of the Oklahoma Court of Criminal Appeals over criminal matters, however, we are not persuaded that a petitioner could reasonably rely upon the Oklahoma Supreme Court's prior adoption of a mailbox rule for any other court. At best, such reliance would constitute a mistake of law solely attributable to appellant, generally an improper basis for equitable tolling.

While it is true that Appellant did not learn that his appeal had been rejected for untimeliness until September 8, 1997, five days after the one-year federal habeas limitation period had passed, we are simply unable to find that this (appellate delay) constitutes an extraordinary circumstance that somehow could excuse a protective federal filing, even given the importance of exhausting state remedies, see 28 U.S.C. § 2254(b)(1).

Because we are not empowered to expand the reach of federal equitable tolling solely for federal habeas claims, we must agree with the district court that equitable tolling cannot save this Petition.

Appellant's application for a COA is DENIED, and this appeal is DISMISSED.

Entered for the Court

s/Paul J. Kelly, Jr.
Paul J. Kelly, Jr.
Circuit Judge

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

[stamp-FILED; APR 13, 1998; ROBERT D. DENNIS, CLERK U.S. DISTRICT COURT, WESTERN DIST. OF OKLA. BY K. BUCKHOTZ, DEPUTY]

LARRY D. KIEL,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. CIV-97-1737-C
	)	
H.N. "SONNY" SCOTT,	)	
	)	
Respondent.	)	

REPORT AND RECOMMENDATION

Petitioner, a state prisoner appearing pro se, brings this action pursuant to 28 U.S.C. §2254 seeking a Writ of Habeas Corpus. Respondent has filed a Motion to Dismiss, alleging that Petitioner has filed the Petition beyond the one-year period of limitation imposed on such petitions by U.S.C. §2244 (d) (1). Petitioner has responded to the motion, thus placing the matter

at issue. The matter has been referred to the undersigned Magistrate Judge for initial proceedings consistent with 28 U.S.C. §636 (b) (1) (B). For the reasons set forth herein, it is recommended that the Respondent's motion be granted.

Petitioner is challenging his 1992 convictions and sentences of 1000 years imprisonment for trafficking in illegal drugs, 1000 years for possession of controlled dangerous substance with intent to distribute, 250 years for possession of controlled dangerous substance without a tax stamp, 250 years for maintaining a vehicle where a controlled dangerous substance is kept, and one year and $1,000.00 fine for possession of drug paraphernalia, all after former conviction of two or more felonies. Case No. CF-91-2683, District Court of Oklahoma County. As grounds for relief, Petitioner alleges that (1) because the Oklahoma Court of Criminal Appeals (OCCA) declined jurisdiction of his untimely appeal from the denial of post-conviction relief and rejected his attempt to subsequently

file a Petition for rehearing, there is an absence of available State Court corrective process to protect his constitutional rights; (2) the OCCA erred by failing to grant his Petition for rehearing following the affirmance of his convictions on direct appeal. As noted, Respondent has not addressed the merits of Petitioner's claims. Rather, he alleges that Petitioner's habeas action must be dismissed because he has filed his Petition beyond the one-year period of limitation set forth in 28 U.S.C. §2244 (d).

Discussion

Prior to the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (The Act"). Pub. L. No. 104-132, 110 Stat. 1214, effective April 24, 1996, state prisoners had almost unfettered discretion in deciding when to file a Federal Habeas Petition. Calderon v. U.S. District Court for the Central District of California, 128 F.3d 1283, 1286 (9th Cir. 1997), cert.

denied, 118 S. Ct. 899 (1998), and cert. denied, ___S. Ct. ___ (April 6, 1998) (No. 97-7685); see also Vasquez v. Hillery, 474 U.S. 254, 264-65 (1986). However, the Act amended 28 U.S.C. §2244 by imposing a one-year period of limitation for the filing of a Federal Habeas Corpus Petition seeking relief from a State Court judgment. Specifically, Section 101 of the Act added the following provisions:

> (d) (1) A 1-year period of limitation shall apply to an application for a Writ of Habeas Corpus by a person in custody pursuant to the judgment of a State Court. The limitation period shall run from the latest of -
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. §2244 (d).

Petitioner's convictions in Case No. CF-91-2683 were affirmed on direct appeal by an Emergency Appellate Division panel of the OCCA on June 9, 1995, F-92-608, and his Petition For Rehearing was denied on May 1, 1996. Respondent's Brief in Support of Motion to Dismiss [hereinafter Respondent's Brief], Exs. A and B. As Petitioner did not seek certiorari review by the Supreme Court within the 90 days allowed, his convictions became "final" for purposes of §2244 (d) (1)[1] on

[1] The limitation period established by §2244 (d) (1) begins to run when a State Court Judgment becomes "final" with finality defined in the statute as "the conclusion of direct review or the expiration of the time for seeking such review...." 28 U.S.C. §2244 (d) (1) (A). The alternative circumstances described in §2244 (d) (1) for

July 31, 1996, and the statutory one-year period began to run, giving Petitioner until July 31, 1997, to file his Habeas Petition. See Griiffin v. Kentucky, 479 U.S. 314, 321 n. 6. (1987) (judgment is final when time for seeking certiorari review has elapsed or petitioner for certiorari is finally denied).

On April 16, 1997, within the statutory one-year period, Petitioner filed an Application For Post-Conviction Relief in the Oklahoma County District Court, thus tolling the running of the one-year limitation period with 106 days remaining. Petition, Attached Post-Conviction Findings of the Oklahoma District Court, dated May 21, 1997. The post-conviction Application was denied by the District Court on May 21, 1997, id., and Petitioner appealed that decision. By Order, entered September 8, 1997, the OCCA declined jurisdiction of Petitioner's attempted appeal because he failed to timely file the appeal

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timeliness of the instant Petition.

pursuant to Rule 5.2 C) (2), Rules of the Oklahoma Court of Criminal Appeals, Okla. Stat. Tit. 22. Ch. 18, App. Respondent's Brief, Ex. B, PC-97-893; see also Petition, Attached Petition in Error, PC-97-893, file-stamped June 23, 1997. Petitioner attempted to file a petition for rehearing/reconsideration in the OCCA, but such document was returned because, pursuant to Rules 5.4 and 10.6(D), a petition for rehearing following the final order issued by the OCCA is prohibited. Petition, Attached Petition for Rehearing, PC-97-893, filed September 15, 1997, letter of the Deputy Clerk of the Appellate Courts, dated September 15, 1997.

Respondent argues that because Petitioner failed to file an appeal within thirty days following the District Court's denial of post-conviction relief, as required by Rule 5.2(C), supra, his untimely filed appeal does not qualify as a "properly filed" collateral attack for tolling purposes, pursuant to 28 U.S.C. §2244 (d) (2) tolling of the limitation period for this action

ceased as of that date. Because the Petition herein was not filed until October 29, 1997, some 161 days later, Respondent contends that the Petition was untimely filed.

In response, Petitioner argues that his appeal was "properly filed" within the 30 days allowed because on June 19, 1997, one day before it was due, he delivered his appellate pleadings to prison officials for mailing to the Clerk of the State Appellate Court. Therefore, Petitioner contends his appeal should be considered timely under the authority of Houston v. Lack, 487 U.S, 266 (1988), despite any failure of his pleadings to reach the clerk prior to the appellate deadline. According to Petitioner, the State Appellate Court should have considered his appeal documents timely filed, and this Court should likewise consider his post-conviction appeal timely filed, and thus "properly filed" for §2244 (d) (2) tolling purposes.

The courts that have addressed the meaning of "properly filed" for purposes of §2244 (d) (2) have concluded that a Collateral

Collateral Review Application filed according to the procedural rules of the State constitutes "a properly filed application" for the purpose of triggering the tolling mechanism of §2244 (d) (2). See Lovasz v. Vaughn, 134 F.3d 146, 148 (3d Cir. 1998) (stating that a properly filed Application as used in §2244 (d) (2) is "one submitted according to the State's procedural requirements, such as the rules governing the time and place of filing"); see also Holloway v. Corcoran, 980 F.Supp. 160, 161 (D.Md. 1997) (same); Hughes v. Irvin, 967 F. Supp. 775 (E.D. N.Y. 1997) (same, noting that in other contexts the term "properly filed" refers to satisfying procedural requirements, citing Rothman v. United states, 508 F.2d 648, 651 (3d Cir. 1975) (requirements for properly filed notice of appeal) and Cohen v. S.U.P.A., Inc., 814 F. Supp. 251, 258-59 (N.D. N.Y. 1993) (requirements for properly filed EEOC complaint). Using the construction given "properly filed" by the above courts, Petitioner's untimely appeal from his denial of post-conviction

relief was not "properly filed" for tolling purposes.[2] Thus, the statute began running again when the District Court denied Petitioner's post-conviction application on May 21, 1997, allowing Petitioner only until September 4, 1997, to file his Habeas Petition.[3] However, he did not file his Habeas Petition in this Court until October 29, 1997, nearly two months after the

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[2] To the extent Petitioner requests that this Court reconsider the procedural ruling made by the State Appellate Court, he is confused about the function of this Court and its limited role in reviewing State Court criminal convictions. This Court does not sit as a "super appellate" Court to review State Court decisions. See Robinson v. State of Oklahoma, 404 F.Supp. 1168, 1170 (W.D. Okla. 1975). Moreover, the OCCA has held that the "mailbox rule" established by Houston v. Lack, supra, does not apply to appeals in criminal matters to that Court. Hunnicutt v. State, 1997 OK CR 77, ¶¶6 and 7, __P.__ (Okla. Crim. App. 1997).

[3] The undersigned notes that the Petition is untimely even if the court considers the statutory period tolled during 30 day period in which Petitioner could have filed his Petition in error and supporting brief to appeal the District Court's denial of post-conviction relief. See Rule 5.2 (C) (2), Rules of the Oklahoma Court of Criminal Appeals, Okla. Stat. Tit. 22. Ch. 18, App. Exclusion of this 30-day time period from the running of the statutory one-period would only allow Petitioner until October 4, 1997, to file his habeas action in this Court.

limitation period, including the tolling during Petitioner's post-conviction proceeding in the State District Court, had expired. Accordingly, the undersigned finds that Petition is untimely and must be dismissed.

To the extent equitable tolling may be applicable to the Petitioner's untimely Petition, Petitioner fails to demonstrate any "extraordinary" reason why he could not have prepared and filed his Petition by September 4, 1997.[4] Certainly his apparent lack of knowledge of the state appellate procedural rules does not provide any basis for this court to extend the limitation period. See Watson v. New Mexico, 45 F.3d 385, 388 (10th Cir. 1995) (in procedural default context, Petitioner's lack of

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[4] In Calderon, supra, the Ninth Circuit found that the statutory period of limitation set forth at §2244 (d) (1) may in "extraordinary circumstances" be subject to equitable tolling. Calderon, 128 F.3d at 1288. The issue of equitable tolling has not been addressed by this Circuit. However, even assuming the statutory limitation may be subject to equitable tolling, Petitioner has not demonstrated that "extraordinary circumstances" beyond (his) control (made) it impossible to file a Petition on time". Id.

knowledge of the law is not an "external factor" sufficient to establish "cause"); See also Brown v. Superintendent, Elmira Correction Facility, No. 97 ICV. 3303 (MBM), 1998 WL 75686, at *4 (S.D. N.Y. 1998) ("A self-serving statement that the litigant is ignorant of the law is not grounds for equitable tolling of [the Act's] statute of limitations"). (unreported decision). Nor does he offer any rationale for further extending the limitation period beyond September 4. Thus, the undersigned finds that the Petitioner has fa led to present any basis for "equitable tolling" of the limitation period. See, United States v. Van Poyck, 980 F.Supp. 1108, 1110 (C.D. Cal. 1997) (applying equitable tolling where external forces rather than [Petitioner's] "lack of diligence", account for his failure to file his Petition on time.). Petitioner is therefore not entitled to relief from the limitation period Congress has manifestly intended to accelerate the federal habeas process. Accordingly, the undersigned finds that the Petitioner has filed his Habeas

Petition beyond the one-year period of limitation as prescribed by 28 U.S.C. §2244 (d) and recommends that the Petition be dismissed as untimely.

RECOMMENDATION

For these reasons, it is the recommendation of the undersigned Magistrate Judge that the Petition be deemed untimely and that the Respondent's Motion to Dismiss [Document No. 9] be granted. The Petitioner is advised of his right to object to this Report and Recommendation by April 28, 1998, in accordance with 28 U.S.C. §636 and Local Rule 72.1. The Petitioner is further advised that failure to make timely objection to this Report and Recommendation waives his right to appellate review of both factual and legal issues contained herein. Moore v. United States, 950 F.2d 656 (10th Cir. 1991). This Report and Recommendation disposes of all issues referred to the undersigned Magistrate Judge in the captioned matter.

ENTERED this 13th day of April, 1998.

s/Bana Roberts
BANA ROBERTS
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR

THE WESTERN DISTRICT OF OKLAHOMA

[stamp-FILED; APR 30, 1999; ROBERT D. DENNIS, CLERK, U.S. DIST. COURT, WESTERN DIST. OF OKLA]

LARRY D. KIEL,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. CIV-97-1737-C
	)	
H.N. "SCOTT" SCOTT,	)	
	)	
Respondent.	)	

ORDER OF DISMISSAL

This action seeking a Writ of Habeas Corpus by a person in state custody was brought under the authority of 28 U.S.C. §2254 and was referred to Magistrate Judge Bana Roberts for initial proceedings consistent with 28 U.S.C. §636 (b) (1) (B). The Magistrate Judge entered her Report and Recommendation on April 13, 1998, to which Petitioner timely objected. The Court has thus reviewed the entire matter de novo.

The facts and law are fairly and completely stated in the Report and Recommendation of the Magistrate Judge. Petitioner raises no matter of fact or law that was not clearly and accurately addressed by the Magistrate Judge. The Court therefore adopts the Report and Recommendation in its entirety, and for the reasons stated therein, overrules all objections raised by Petitioner.

Accordingly, consistent with the Report and Recommendation, the Petition for Writ of Habeas Corpus is dismissed. As Petitioner fails to make a "substantial showing of the denial of a constitutional right", 28 U.S.C. 22553(c)(2); Fed. R. App. P. 22, a Certificate of Appealability is denied. Likewise, Petitioner is denied leave to appeal in forma pauperis.

IT IS SO ORDERED this 30 day of April, 1998.

s/ Robin J. Cauthron
ROBIN J. CAUTHRON
UNITED STATES DISTRICT JUDGE

OFFICE OF THE CLERK
BYRON WHITE UNITED STATES COURTHOUSE
1823 STOUT STREET
DENVER, COLORADO 80257
(303) 844-3157

PATRICK FISHER
CLERK

LISABETH A. SHUMAKER
CHIEF DEPUTY CLERK

[stamp-FILED; March 10, 1999; A.J. SCHULER, DEPUTY CLERK, TENTH CIRCUIT COURT OF APPEALS]

NOTIFICATION OF MAILING

Re: 98-6208, Kiel v. Scott
Dist/Ag Docket: CIV-97-1737,

A COPY OF THE ATTACHED ORDER HAS BEEN PLACED IN THE UNITED STATES MAIL THIS DATE ADDRESSED AS FOLLOWS:

Mr. Steven E. Lohr
Mr. William J. Holmes
Office of the Attorney General
State of Oklahoma
2300 N. Lincoln Blvd.
Suite 112
Oklahoma City, OK 73105-4890

Mr. Larry D. Kiel
Joseph Harp Correctional Center
#208518
P.O. Box 548
Lexington, OK 73051

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

LARRY D. KIEL,	)	
	)	
Petitioner - Appellant,	)	
	)	
v.	)	No. 98-6208
	)	
H.N. SCOTT,	)	
	)	
Respondent - Appellee.	)	

ORDER

[stamp-FILED, March 10, 1999; PATRICK FISHER; CLERK, TENTH CIRCUIT COURT OF APPEALS]

Before **PORFILIO, BARRETT,** and **KELLY,** Circuit Judges.

Appellant's petition for rehearing is denied.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the suggestion is also denied.

OKLAHOMA STATUTES ANNOTATED
TITLE 12. CIVIL PROCEDURE
CHAPTER 15. APPEALS AND ERROR

§ 990A. Appeal to Supreme Court by filing petition in error–Rules–Record on appeal–Premature appeal–Designation of record

A. An appeal to the Supreme Court of Oklahoma, if taken, must be commenced by filing a petition in error with the Clerk of the Supreme Court of Oklahoma within thirty (30) days from the date a judgment, decree, or appealable order prepared in conformance with Section 696.3 of this title is filed with the clerk of the trial court. If the appellant did not prepare the judgment, decree or appealable order to be mailed to the appellant, and the court records do not reflect the mailing of a copy of the judgment, decree, or appealable order to the appellant within three (3) days, exclusive of weekends and holidays, after the filing of the judgment, decree, or appealable order, the petition in error may be filed within thirty (30) days after the earliest date on which the court records show that a copy of the judgment, decree, or appealable order was mailed to the appellant.

B. The filing of the petition in error may be accomplished either by delivery or by certified mail with return receipt requested to the Clerk of the Supreme Court. The date of filing or the date of mailing, as shown by the postmark affixed by the post office or other proof from the post office of the date of mailing shall constitute the date of filing of the petition in error. If there is no proof from the post office of the date of mailing, the date of receipt by the Clerk of the Supreme Court shall constitute the date of filing of the petition in error.

AFFIDAVIT OF MOSES METOYER MUHAMMAD
INMATE LAW CLERK AT
JOSEPH HARP CORRECTIONAL CENTER

[Notary Seal, CLEVELAND COUNTY – APR.22, 1998; SANDRA DORRIS, NOTARY PUBLIC]

STATE OF OKLAHOMA)
) ss.
COUNTY OF CLEVELAND)

I, Moses Metoyer Muhammed, being of lawful age, and having been duly sworn upon my oath, hereby depose and state that:

I am an inmate law clerk at JHCC and during the period of inmate Larry D. Kiel filing of his petitions both in State and Federal Courts. The JHCC law library only had Federal Reporters starting at volume 615 F.2d, ending at 918 paper back volume, L.Ed.2d starting at volume 1, ending at paper back volume 132, August, 1995, and receives no slip opinions to update inmates on how different Circuit Courts, United States District Courts and the Supreme Court of the United States are setting forth rules, guidelines and laws in relation to filing a petition for federal habeas corpus. JHCC law library does have updates on USCA and a system that will allow one to request through law library supervisor for legal materials/cases by FAX (if you already have case name and citation). I just received (4/21/98) by FAX Calderson v. U.S.District Court for the Central District of California, 128 F.3d 1283, (9th Cir.1997), and U.S. v. Simmonds, 111 F.3d 737 (Cir. 1997).

When a inmate is appearing in forma pauperis he has to send his forms pauperis request to the JHCC Trust Fund, sometimes this is a 2 to 3 day process and sometimes a inmate may wait a week or so before his forma pauperis is returned to be notary for filing with one's petition.

s/ Moses Metoyer Muhammad
Signature of Affiant

Subscribed and sworn to before me this 22 day of April, 1998.

Notary Public: s/Sandra Dorris
My commission expires: 7-27-99